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JAN 16 1984
ALEXANDER L. STEVAS,
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Case No. 83-1003

In The

Supreme Court

Of The United States

DONALD E. PERCY,

Petitioner,

v.

MILDRED DAUBERT and
ETHEL ROYSTER, Individually
and on behalf of all other
persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

When a prospective injunction, permissible at the time of entry under the Eleventh Amendment, is later erroneously modified and the modification is reversed on appeal, does the Eleventh Amendment bar the restoration of the benefits which would have been provided respondents, consistent with the Eleventh Amendment, had the injunction not been erroneously modified?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 2
STATEMENT OF THE CASE 6
SUMMARY OF ARGUMENT 7
ARGUMENT 8
I. THE ELEVENTH AMENDMENT AS INTERPRETED BY THIS COURT AND THE COURTS OF OTHER CIRCUITS DOES NOT BAR AN ORDER WHICH DOES NOTHING MORE THAN EFFUCTUATE AN INJUNCTION PREVIOUSLY ISSUED CONSISTENT WITH THE ELEVENTH AMENDMENT 8
II. THE COURT OF APPEALS IS CORRECT IN ITS RULING ON THE DISTRICT COURT'S AUTHORITY TO GRANT RELIEF ON REMAND 10
III. THE COURT OF APPEALS' CONSIDERATION OF PETITIONER'S OPPORTUNITY TO SET ASIDE FUNDS IS CONSISTENT WITH DECISIONS OF THIS COURT 13
CONCLUSION 17

TABLE OF AUTHORITIES

Cases Cited

Arkadelphia Co. v. St. Louis S.W. Ry. Co., 249 U.S. 134 (1919) 13
Edelman v. Jordan, 415 U.S. 651 (1974) 9, 14, 15
Hutto v. Finney, 437 U.S. 678 (1977) 10, 12, 14
Kimble v. Solomon, 559 F.2d 599 (4th Cir.), cert. denied, 440 U.S. 950 (1979) 9
Quern v. Jordan, 440 U.S. 332 (1979) 9
Rodriguez v. Swank, 496 F.2d 1110 (7th Cir. 1974), *cert. denied*, 419 U.S. 885 10
Vecchione v. Wohlgemuth, 558 F.2d 150 (3rd Cir. 1977), *cert. denied*, 434 U.S. 943 (1977) 10

Other Authorities

PAGES

Fed. R. Civ. P. 60 (b)(5) 11
5 Am.Jur.2d §955 12
5 Am.Jur.2d §997 ..... 12, 13
5B C.J.S.Appeal and Error §1950 12

STATEMENT OF THE CASE

Respondents accept the Statement of the Case contained in the petition with the following modifications and additions.

This case has already been before this Court on another petition for certiorari filed by this same petitioner on October 30, 1981 in which petitioner sought review of the decision of the United States Court of Appeals for the Seventh Circuit reversing in part the modification of the 1973 injunction. Petitioner's Appendix 149. The petition for certiorari was denied by this Court on January 11, 1982.

It was subsequent to the denial of that petition that the district court then considered the appropriate relief to be granted respondents in light of the Court of Appeal's decision.

In describing the relief sought by respondents on remand to the district court to determine the appropriate relief, petitioner characterizes the relief as "retroactive monetary relief." To be more precise, respondents were seeking the AFDC benefits which would have been paid from November 5, 1980 to April 1, 1981 under the 1973 injunction had that injunction not been erroneously modified by the district court during that time period. Petitioner appealed from the district court decision granting that relief. Petitioner's Appendix 145. When the Court of Appeals affirmed that decision (Petitioner's Appendix 149), petitioner sought a rehearing and rehearing *en banc*, which was denied by the Court of Appeals on September 20, 1983.

SUMMARY OF ARGUMENT

Respondents contend that the petition for a writ of certiorari should not be granted because the decision of the Court of Appeals for the Seventh Circuit that the Eleventh Amendment does not bar the relief granted is not inconsistent with the decisions of this Court or courts of other circuits and is a correct application of the law to an unusual set of circumstances not likely to arise again.

ARGUMENT

I. THE ELEVENTH AMENDMENT AS INTERPRETED BY THIS COURT AND THE COURTS OF OTHER CIRCUITS DOES NOT BAR AN ORDER WHICH DOES NOTHING MORE THAN EFFECTUATE AN INJUNCTION PREVIOUSLY ISSUED CONSISTENT WITH THE ELEVENTH AMENDMENT.

The judicial history of this case, which gives rise to the issue presented on review, represents a rather unique set of circumstances. A prospective injunction was entered in 1973 which required petitioner to provide AFDC benefits[1] to eligible applicants retroactive to the first date of the month of application. This necessitated the expenditure of substantial funds, and petitioner had been expending these funds for years in compliance with the injunction. Petitioner ceased expending the funds in question on November 5, 1980, because the district court granted petitioner's request to modify the injunction to limit the initial month's benefits. However, the Court of Appeals determined that the modification of the injunction was erroneous for the period from November 5, 1980 to April 1, 1981.[2] Petitioner now claims that the Eleventh Amendment bars an order requiring the expenditure of funds which he would have had to expend, consistent with the Eleventh Amendment, had the 1973 injunction not been erroneously modified.

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[1]The 1973 injunction also concerned other benefit programs, but the other programs are no longer in effect and thus are not relevant to this proceeding.

[2]On April 1, 1981 state legislation passed which, as respondents conceded before the Court of Appeals, did make proper a modification of the injunction.

In its decision, the Court of Appeals considered the relevant leading decisions of this Court on the Eleventh Amendment, specifically, *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Quern v. Jordan*, 440 U.S. 332 (1979). The Court of Appeals concluded that these decisions do not bar the order entered by the district court because that order does nothing more than effectuate the 1973 injunction during the time period it was erroneously modified.

Petitoner argues that *Edelman v. Jordan* and the cases following it bar the district court order because they prohibit the granting of "retroactive monetary relief" against state officials. However, all the cases discussed by petitioner, including *Kimble v. Solomon*, 559 F.2d 599 (4th Cir), *cert. denied*, 440 U.S. 950 (1979), concern the propriety of orders which require state officials to compensate for monetary loss occuring prior to the entry of any prospective injunction. By contrast, in this case the funds which petitioner contends they should not have to pay are *not* compensation for a loss occurring prior to the entry of the prospective injunction on June 1, 1973. Rather, they are funds which were required to be paid by the terms of that injunction but which were not paid for a particular period of time because it was erroneously modified. Therefore, the facts of this case do not come within the prohibition of *Edelman v. Jordan*.

The continual characterization by petitioner of the relief ordered by the district court as "retroactive" does not answer the obvious question, which is: retroactive in relation to what? According to petitioner's view, the prospective/retroactive distinction can shift continually throughout litigation, so that the very relief obtainable under an order which was prospective, and therefore permissible, when entered, can become retroactive, and therefore barred, at a later point in litigation. Neither *Edelman*

v. Jordan nor subsequent cases cited by petitioner suggest such a reading of the Eleventh Amendment.

Indeed, this Court has recognized that the "line between retroactive and prospective relief cannot be so rigid that it defeats effective enforcement of prospective relief." *Hutto v. Finney*, 437 U.S. 678, 690 (1977). In that case, this Court upheld an award of attorney's fees against a state which had not complied with a prospective injunction. In addition to referring to *Hutto v. Finney*, the Court of Appeals considered circuit court cases in which states have been ordered to expend funds to comply with previously entered prospecitve injunctions. *Vecchione v. Wholgemuth*, 558 F.2d 150 (3d Cir. 1977), *cert. denied* 434 U.S. 943 (1977); *Rodriguez v. Swank*, 496 F.2d 1110 (7th Cir. 1974), *cert. denied*, 419 U.S. 885. While the Court of Appeals recognizes that these cases differ from the instant case in that petitioner was acting pursuant to the district court's order modifying the 1973 injunction in his withholding of the funds, it correctly recognizes that the reasoning of the cases just cited do not rest primarily on the culpable nature of the state's conduct. Rather, it rests on a recognition that when an injunction is entered which is permissible at the time of entry under the Eleventh Amendment, the Eleventh Amendment does not bar a later order which does nothing more than effectuate the previously entered injunction.

II. THE COURT OF APPEALS IS CORRECT IN ITS RULING ON THE DISTRICT COURT'S AUTHORITY TO GRANT RELIEF ON REMAND.

All of petitioner's arguments follow from his initial and erroneous assumption: that for purposes of the Eleventh Amendment, relief after reversal of ar

order modifying an injunction is to be treated the same as relief granted in an initial injunction. Thus, petitioner wishes this Court to analyze its behavior in withholding funds pursuant to the district court's order of October 21, 1980, granting modification as though no injunction ordering the expenditure of funds had previously existed and as though the order granting modification were not later reversed.

Petitioner begins by presenting arguments justifying the modification. Specifically, petitioner argues that because the district court in its October 21, 1980 order found that the 1973 injunction was broader than that required by statutory or constitutional law, he was not violating statutory or constitutional law in withholding the funds pursuant to the district court's order modifying the injunction. Therefore, he concludes, the Eleventh Amendment prohibits an order restoring those funds after reversal of the modification. The argument that the 1973 injunction was overly broad is precisely the argument which was presented to the district court on petitioner's motion for modification, and the district court accepted it as a basis for modification of the injunction. However, the Court of Appeals reversed that decision, concluding that the 1973 injunction was improperly modified prior to April 1, 1981, because the petitioner had not shown changed and unforeseen circumstances as required by Fed R. Civ. P. 60 (b)(5). This can only mean that the original 1973 injunction was lawful prior to April 1, 1981. Since this Court decided not to review the decision of the Court of Appeals but left it standing, the decision of the Court of Appeals is the final decision on the validity of the 1973 injunction prior to April 1, 1981. It would therefore be inappropriate to permit petitioner to raise again and in this context his objections to the 1973 injunction.

Petitioner is really arguing, it appears, that the 1973 injunction is not entitled to be enforced and effectuated to the same degree as another injunction might be because it was not based on a violation of statutory or constitutional law. The flaw in this postion can be demonstrated by assuming that the injunction had not been improperly modified but had continued in effect until April 1, 1981. Petitioner would obviously have been in contempt of the 1973 injunction had he disregarded it, and this Court has made clear that monetary awards to compensate for noncompliance with lawful federal court injunctions are not barred by the Eleventh Amendment. *Hutto v. Finney, supra,* 437 U.S. at 691. However, in petitioner's view, he could never be found in contempt of the 1973 injunction because he would only be violating a lawful injunction, not a statutory or constitutional law. Such a position has no support in case law, has the effect of negating the decision of the Court of Appeals reversing modification, and is clearly untenable.

In a similar vein, petitioner argues that because he was acting pursuant to the district court's order permitting modification in withholding funds, his actions were not unlawful, and, therefore, an order restoring those funds is barred by the Eleventh Amendment. Respondents do not, of course, contend that petitioner committed a wrong in altering his policy once the district court permitted modification of the 1973 injunction. Until the decision was reversed, petitioner was justified in acting consistent with it. 5 Am.Jur.2d §997. However, all actions taken pursuant to the decision are dependent for their validity on the decision being sustained. 5Am.Jur.2d §§997, 955. The effect of reversal is to leave the case standing as if the decision reversed had never been rendered. 5B C.J.S. Appeal and Error §1950. Further, the general rule of law is that the party who lost

benefits as a result of a judgment reversed on appeal is entitled to be restored by the other party to the position he would have been in had the erroneous judgment not been entered. *Arkadelphia Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134 (1919). 5 Am.Jur.2d §997.

Petitioner cites no cases which support his position that the Eleventh Amendment is in any way intended to limit the customary authority of a court to remedy the effect of an order reversed on appeal. As already stated, the cases petitioner relies on simply do not address this situation because they are concerned with the appropriate limits of the original injunction.

III. THE COURT OF APPEALS' CONSIDERATION OF PETITIONER'S OPPORTUNITY TO SET ASIDE FUNDS IS CONSISTENT WITH DECISIONS OF THIS COURT.

Petitioner argued before the Court of Appeals that failure to reverse the district court's order would create budgetary problems because petitioner had spent the funds withheld pending appeal on other items.

In its decision the Court of Appeals considered significant the fact that petitioner had been expending the funds in question under the 1973 injunction prior to the modification of that injunction, and, since an appeal was taken from that modification, he had the option of setting aside the funds he was withholding until the appeal was decided. Petitioner now argues that consideration of these factors is not permitted by the Eleventh Amendment. However, respondents contend that these factors were correctly taken into account by the Court of Appeals in a

manner consistent with this Court's decision in *Edelman v. Jordan, supra,* and *Hutto v. Finney, supra.*

In *Edelman v. Jordan,* this Court held that a monetary award of welfare benefits to compensate for a time period prior to the entry of the prospective injunction ordering payment of those benefits in the future was barred by the Eleventh Amendment. In so holding, this Court noted that while most prospective injunctions in welfare cases may well have a financial impact on state treasuries, there is a crucial distinction between requiring payment of funds pursuant to a prospective injunction, and requiring payment for a time period previous to the entry of the injunction:

> "...[W]here the state has a definable allocation to be used in payment of public and benefits, and pursues a certain course of action such as processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariable mean there is less money available for payments for the continuing obligations of the public aid systems." 415 US at 666 n. 11.

Thus, it is the fact that a monetary award for an earlier period cannot be allocated in the state's planning process without disruption to other programs which distinguishes it from money expended pursuant to a prospective injunction.

In *Hutto v. Finney, supra,* this Court refers to the passage from *Edelman v. Jordan* just cited, again emphasizing that the critical factor is the state's opportunity to adjust its budget. In upholding an

award of attorney's fees against a state which had disregarded a prospective injunction, this Court notes:

> "The Attorney General has not argued that this award was so large or so unexpected that it interfered with the state's budgeting process. Although the Eleventh Amendment does not prohibit attorney's fees awards for bad faith, it may counsel moderation in determining the size of the award or giving the state time to adjust its budget before paying the full amount of the fee. Cf *Edelman v. Jordan*, 415 U.S. 651, 666 n.11. In this case, however, the timing of the award has not been put in issue; nor has the state claimed that the award was larger than necessary to enforce the court's prior orders." 437 U.S. at 692, n. 18.

Unlike the fact situation in *Edelman v. Jordan, supra*, petitioner clearly had the option of avoiding disruption to the state budgetary process by reserving the funds in question until the appeal was decided. Petitioner argues that he did not do this because he wanted to spend this money on other items, which was his purpose for attempting to modify the injunction, and this purpose would have been frustrated if he had set aside the funds pending appeal. This is clearly an acknowledgment he had a choice as to how this money should be treated pending appeal. If there is any disruption to the state's budgetary process as a result of the district court's order on remand, it is not an unanticipated and avoidable one, but one brought about by petitioner's decision to allocate the funds in question for other purposes pending appeal.

Oddly enough, petitioner points out in support of his position that had the Court of Appeals granted

respondents' motion for a stay of the modification pending appeal, he would have had to continue to pay out the funds which he now contends he should not have to pay. Petitioner asserts he relied on the denial of the stay in diverting the funds to other programs. However, while denial of the stay made it legal for petitioner to withhold the funds pending appeal, it in no way, explicitly or implicitly, protected him from ever having to restore the funds withheld if the appeal was successful.

It is apparent from petitioner's argument that what he objects to is not the lack of opportunity to plan for the expenditure of funds in question, so that it can be accomplished without disruption to the state budgetary process, but rather to expending those funds at all to effectuate the 1973 injunction. However, as the Court of Appeals notes, the Eleventh Amendment is not intended to insulate a state from the possibility that a modification of a long-standing injunction will not be reversed on appeal.

Petitioner has not shown that the Court of Appeals' interpretation of the Eleventh Amendment is inconsistent with the decisions of this Court or courts of other circuits. While petitioner claims that the lower federal courts have "blatantly acted beyond their constitutional authority," they have done no more, in fact, than effectuate an injunction granted in 1973 consistent with the Eleventh Amendment by requiring the expenditure of funds for a five-month period during which the injunction was erroneously modified. Petitioner has, moreover, achieved the result he sought, that is, limiting the expenditure of such funds in the future, through a state legislative change effective April 1, 1981. Finally, given that the issue which petitioner wishes this Court to review arises from the rather unique history of this case, it is unlikely it will need to be addressed again.

For these reasons, respondents respecfully submit that this Court should deny the petition for writ of certiorari.

Dated at Madison, Wisconsin this 13th day of January, 1984.

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